University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Quarterly, November to June, by the University of Pennsylvania Law School, a 34th and Chestnut Streets, Philadelphia, Pa.

$2.50 PER ANNUM; FOREIGN, $3.00; SINGLE COPIES, 65 CENTS.

NOTES.

THE EFFECT OF THE CLAYTON ACT ON PICKETING.—The Clayton Act[1] forbids an injunction in labor controversies prohibiting "any person from attending at any place where such person may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do." It was held by the Federal Supreme Court in the recent case of

[1] Oct. 15, 1914, c. 323, 38 U. S. Stat. at Large 738 (sec. 20).

American Steel Foundries v. Tri-City Trades Council [2] that under this section picketing by even a small group was unlawful, and that it might be enjoined as such, but that it was lawful for strikers to have a single representative at each entrance to the plant of the employer to announce the strike and peaceably persuade the workers to join them in it.

It is no longer a subject of controversy in any jurisdiction that injunctive relief will be granted to employers against strikers who seek to enforce their demands, though they be in themselves lawful, by a system of picketing whose purpose is the intimidation of employees or patrons by threats, assaults, or acts of violence causing physical injury.[3] Nor is it, in general, necessary to show that bodily harm has been done any one. An injunction will be granted to restrain picketing where the intimidation of workers has been produced by the threatening attitude of the pickets,[4] or merely by their abusive or insulting language.[5] The ground on which such relief is granted is that the employer's right of property in his business is being unjustifiably interfered with to his irreparable damage, and that he and his present or prospective employees are being forcibly deprived of their right to contract freely.[6] So also will picketing be enjoined where customers are compelled to withdraw their patronage by the fear, annoyance or great inconvenience caused them by the pickets.[7]

Although militant picketing is thus universally condemned, "peaceful" picketing, so called, is permitted in the great majority of jurisdictions. Consequently, decrees enjoining militant picketing have been limited so as to forbid only the unlawful acts of violence and intimidation. Thus injunctive relief will not generally be granted to restrain picketing which is conducted in an orderly manner for the purpose either of peacefully persuading employees to quit work,[8] or of advertising the strike,[9] or of counting the number of workers or conducting some other enterprise unconnected with the operation of the employer's business.[10] Whether or not picketing is legal has been made to depend upon the manner in which it is conducted, and if the element of intimidation be lacking it will

[2] Adv. Op. U. S. Sup. Ct., Oct. Term, No. 2, decided Dec. 5, 1921.

[3] Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n, 200 Pac. 1 (Cal. 1921); Pre' Catelan v. International Federation, 188 N. Y. S. 29 (1921).

[4] Densten Hair Co. v. Leather Workers' Union, 129 N. E. 450 (Mass. 1921).

[5] Skolny v. Hillman, 187 N. Y. S. 706 (1921); O'Neil v. Behanna, 182 Pa. 236, 37 Atl. 843 (1897).

[6] Cooks' Union v. Papageorge, 230 S. W. 1086 (Tex. 1921).

[7] Local No. 313 v. Stathakis, 135 Ark. 86, 205 S. W. 450 (1918).

[8] Walter Wood Co. v. Toohey, 186 N. Y. S. 95 (1921).

[9] *Ex parte* Heffron, 162 S. W. 652 (Mo. App. 1914).

[10] Southern Cal. Iron & Steel Co. v. Amalgamated Assn., note 3, *supra*.

not be enjoined,[11] unless the object sought to be attained by the picketing be itself unlawful.[12]

In a few jurisdictions,[13] however, picketing has been held to be unlawful *per se*. This view apparently originated in the case of Vegelahn v. Guntner,[14] in which Holmes, J., rendered a dissenting opinion. It was there decided that interfering with an employer's business, either by patrolling the streets or by intimidation of workers, should be enjoined. Other courts which have approved this decision have extended its doctrine and enjoined strikers from "peacefully or otherwise picketing plaintiff's plant,"[15] and from maintaining a single picket stationed opposite the entrance to plaintiff's works.[16] In such decisions the courts have proceeded upon the theory that the act of picketing is itself illegal,[17] regardless of the manner in which it is performed, and thus that any picketing should be enjoined.[18] The most forceful exposition of this view is to be found in the case of Atchison, T. & S. F. Ry. Co. v. Gee,[19] where McPherson, J., delivering the opinion of the court, anticipated the attitude of the Supreme Court in the instant case. It was there said that "peaceful picketing" was a contradiction of terms and that "there is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching. When men want to converse or persuade, they do not organize a picket line."

In those jurisdictions which have admitted the possibility of peaceful picketing, the test to be applied, in determining whether or not the picketing is legal, is whether or not the element of intimidation is present.[20] Nor is the mere presence of strikers or patrols in the neighborhood of the plant held to constitute intimidation, even though placards are displayed or circulars are distributed announcing the strike, and employees are peaceably urged to cease work.[21] But it is recognized that all the circumstances of the case must be considered in ascertaining the existence of intimidation, and

[11] Karges Furniture Co. v. Amalgamated Woodworkers Union, 165 Ind. 421, 75 N. E. 877 (1905).

[12] Barnes v. Typographical Union, 232 Ill. 424, 83 N. E. 940 (1908).

[13] Cal., Ill., Mass., Mich., N. J., Wash.

[14] 167 Mass. 92, 44 N. E. 1077 (1896). See also Wilcutt v. Driscoll, 200 Mass. 110, 120, 85 N. E. 897, 902 (1908).

[15] Clarage v. Luphringer, 202 Mich. 612, 168 N. W. 440 (1918).

[16] *In re* Langell, 178 Mich. 305, 144 N. W. 841 (1913).

[17] Barnes v. Typographical Union, note 12, *supra;* York Mfg. Co. v. Oberdick, 10 Pa. Dist. R. 463 (1901).

[18] Pierce v. Stablemen's Union, 156 Cal. 50, 103 Pac. 324 (1909).

[19] 139 Fed. 582 (C. C. 1905).

[20] Walter Wood Co. v. Toohey, note 8, *supra;* Jones v. Van Winkle Gin & Machine Works, 131 Ga. 336, 62 S. E. 236 (1908).

[21] *Ex parte* Heffron, note 9, *supra.*

it has been held that the natural timidity of those sought to be influenced by the picketing is a proper subject of examination by the court.[22] Yet this same test of intimidation is the one applied by courts that have found picketing illegal.[23] By them it is recognized that the sole purpose of picketing is to injure the employer by dissuading his employees from continuing work, and in addition they appreciate that intimidation in some degree is an essential element of the method employed. The mere presence in the vicinity of the plant of numbers of pickets, whose purpose is to make as many employees as possible quit work, is fundamentally hostile,[24] and intimidation may be caused as much by unwelcome importunity and argument as by acts of physical violence.[25]

In the Federal courts there has been a wide diversity of opinion expressed as to the legality of picketing. Some, while granting an injunction restraining militant picketing, have accepted the proposition that peaceful picketing is unobjectionable.[26] Others have held intimidation to be a fundamental element of picketing, and have restrained it in any form,[27] and in a recent case [28] a preliminary injunction against "persuading" was granted. In a decision [29] under the Clayton Act, however, peaceful picketing was approved, and the test established was whether the acts done would be lawful if no strike existed. This test is substantially the same as that adopted by the Supreme Court in the instant case, but since it was there found that picketing was unlawful in any circumstances, a different conclusion was inevitable. In delivering the opinion of the court, Chief Justice Taft said: "It is idle to talk of peaceful communication in such a place and under such conditions. The number of pickets in the groups (from four to twelve) constituted intimidation. The name 'picket' indicated a militant purpose, inconsistent with peaceable persuasion. The crowds they drew made the passage of the employees to and from the place of work, one of running the gauntlet. Persuasion or communication attempted in such a presence and under such conditions was anything but peaceable and lawful." It was found, therefore, that picketing, as in the instant case, was unlawful and was not one of those acts whose restraining by injunc-

[22] King v. Weiss Mfg. Co., 266 Fed. 257 (C. C. A. 1920).

[23] St. Germain v. Bakery & C. Workers' Union, 97 Wash. 282, 166 Pac. 665 (1917).

[24] St. Germain v. Bakery & C. Workers' Union, note 23 *supra*.

[25] Jonas Glass Co. v. Glass Ass'n, 72 N. J. Eq. 653, 66 Atl. 953 (1907), affirmed: 77 N. J. Eq. 219, 79 Atl. 262 (1910).

[26] Union Pacific Ry. Co. v. Ruef, 120 Fed. 102 (C. C. 1902).

[27] Atchison, T. & S. F. Ry. Co. v. Gee, note 19, *supra*.

[28] Charleston Dry Dock Co. v. O'Rourke, 274 Fed. 811 (D. C. 1921). The Clayton Act was here considered inapplicable, since unlawful acts of violence had been committed by the strikers.

[29] Stephens v. Ohio State Telephone Co., 240 Fed. 759 (D. C. 1917).

tion is prohibited by the Clayton Act. Nor was the court willing to rely upon the discretion of the strikers themselves in determining what constituted picketing, and in consequence limited them to one representative at each gate of the plant.

Such a limitation seems warranted both by justice and necessity. The persuasion that the law permits in these circumstances is such as appeals to the judgment, reason, or sentiment, and leaves the mind free to act of its own volition. It is the persuasion of argument and not that of force. It is clear that the arguments of strikers can be presented at one time as well by one person as by a dozen. It is also clear that force cannot be exerted effectively by one man, although it can by a dozen. The Supreme Court has thus given strikers all that they are entitled to have, and also, without prejudice to them, has made it impossible for them to overstep the bounds of their legal rights. Experience has shown that picketing and violence are too often concomitant to make it possible to establish a picket line without introducing the element of intimidation, and it is to be hoped that the attitude of the Supreme Court will commend itself to those state courts that have heretofore entertained the theoretical rather than the practical view of the objection to picketing.

P. P.

THE DOCTRINE OF RES IPSA LOQUITUR IN PENNSYLVANIA.—The successful harnessing of steam and electricity for industrial and commercial purposes, and the perfection of the gasoline engine, have surrounded us with a multitude of powerful machines and apparatus, which, though harmless in normal operation, may produce serious bodily injury if improperly constructed or managed. It thus becomes increasingly important that the law should place the proper degree of responsibility for injury upon the owner or operator of such apparatus. Ought the fact of injury to raise a presumption of culpability on his part? The doctrine of *res ipsa loquitur* answers this question in the affirmative.

Let us examine briefly the foundation, justification, and general scope of the doctrine, and then its limited application in Pennsylvania. The general rule in actions of negligence is that the mere proof of a so-called "accident" raises no presumption of negligence. But where the thing from which the injury results is in the control of the defendant, and the accident is of a sort which in the normal course of events would not be occasioned by the thing if properly managed, here is a presumption, or ground for a reasonable inference, of negligence on the part of the defendant.[1] In such cases, *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from

[1] Scott v. London & St. K. Docks Co., 3 H. & C. 596 (Eng. 1865).